Supreme Court, U.S.
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No. 96-73

In the Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS J. MALONEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government withheld any material exculpatory evidence, such that petitioner is now entitled to a new trial.

2. Whether the district court erred in refusing to instruct the jury that it could find that petitioner withdrew from the conspiracy charged in the indictment by returning a bribe.

3. Whether petitioner's acts of obstruction of justice furthered the conspiracy charged in the indictment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 71 F.3d 645. The opinion of the district court denying petitioner's motion for a new trial (Pet. App. 50a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1995. A petition for rehearing was denied on March 15, 1996. On June 5, 1996, Justice Stevens extended the time for filing a petition for a writ of certiorari until July 13, 1996. The petition for a writ of certiorari was filed on July 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d); extortion under color of official right, in violation of 18 U.S.C. 1951; and obstruction of justice, in violation of 18 U.S.C. 1503. Petitioner was sentenced to 189 months' imprisonment and ordered to pay a fine of $200,000. The court of appeals affirmed. Pet. App. 1a-38a; Gov't C.A. Br. 1.

1. Between 1977 and 1990, petitioner was a judge on the Circuit Court of Cook County, Illinois, where he conducted a number of bench trials in felony criminal cases. Between 1980 and 1985, petitioner took bribes in exchange for delivering acquittals or lenient sentences in several such cases, including at least three murder cases. Then, between 1988 and 1990, petitioner obstructed an investigation conducted by the Federal Bureau of Investigation (FBI) and the Internal Revenue Service (IRS) into his bribe-taking. Pet. App. 1a-6a.

In 1980, attorney William Swano represented Wilfredo Rosario in a double murder case before petitioner. A court bailiff, Lucius Robinson, told Swano that he could arrange a fix with petitioner for between $2,000 and $2,500. Doubtful, Swano asked for a personal meeting with petitioner. At that meeting, petitioner told Swano that Robinson is "my guy, deal with him." A short time later, Swano gave Robinson $2,500 in two installments. At Rosario's trial, peti-

tioner suppressed Rosario's confession and found him not guilty. Pet. App. 3a; Gov't C.A. Br. 7-8.[1]

In May 1981, representatives of the On Leong criminal organization agreed to pay $100,000 to petitioner to assure a not guilty verdict in a murder prosecution against Lenny Chow, an On Leong hit man. Robert Marcy, a Chicago City Ward officer, delivered a portion of the $100,000 to petitioner. At the ensuing bench trial, petitioner found evidence against Chow unreliable and acquitted him. Pet. App. 2a-3a.

In 1982, Swano was representing Ronald Roby, who was charged in five felony deceptive practice cases consolidated before petitioner. Swano approached Robinson to arrange a deal in which Roby would not have to serve prison time. Robinson subsequently told Swano that he had arranged a fix with petitioner, and Swano relayed the details to Roby: for a $5,000 fee, the cases would be "taken care of." Roby paid Swano the $5,000. Following a guilty plea, Maloney sentenced Roby to three years' probation, with the first year to include work release detention on Sundays and Mondays. After sentencing, Swano passed the bribe money to Robinson, who in turn passed it to petitioner. Pet. App. 3a-4a; Gov't C.A. Br. 8-9.

In late 1982, Swano was hired to represent Owen Jones, who was charged with felony murder after beating a man to death with a pipe during a burglary. Swano met with Robinson, explained the details of the case, and stated that he hoped to obtain an acquittal of

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[1] The government introduced evidence of the bribe as evidence of the existence of the charged conspiracy. That particular fix (unlike the others described below) was not charged in the indictment as a specific act of racketeering activity. Pet. App. 3a.

Jones on the charge. Robinson said that he would speak to petitioner. When Swano appeared in petitioner's courtroom a few weeks later, Swano was approached by attorney Robert McGee, petitioner's co-defendant.[2] McGee told Swano that Robinson had become "too hot" to serve as petitioner's bag man. Instead, McGee stated, petitioner wanted Swano to deal with him instead. McGee told Swano that petitioner could not acquit Jones given the evidence in the case and that the best petitioner could do would be to acquit Jones on the felony murder charge, convict him of voluntary manslaughter, and impose a nine-year sentence. Swano later gave between $4,000 and $5,000 to McGee to fix the case. Following a bench trial, petitioner acquitted Jones of felony murder, convicted him of voluntary manslaughter, and imposed a nine-year sentence. Pet. App. 4a; Gov't C.A. Br. 9-11.

In June 1985, Earl Hawkins and Nathan Fields, members of the El Rukns street gang, were charged with murdering two men, and the case was assigned to petitioner. Swano represented Hawkins. Swano told Hawkins that he could secure a favorable decision in a bench trial if Hawkins could raise enough money for the judge. Hawkins referred Swano to Alan Knox, an El Rukns "general," who approved the fix. Petitioner, Swano, and attorney McGee then agreed that petitioner would fix the case for $10,000 if Swano put on "a good case" so that petitioner would not "look[] bad" by delivering a favorable verdict. On the morning of trial, Swano met McGee at a restaurant and

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[2] At trial McGee was convicted of all counts charged against him. Pet. App. 2a n.2. McGee did not appeal his conviction or sentence.

gave him a file folder containing the bribe money. Pet. App. 4a-5a, 12a; Gov't C.A. Br. 11-15.

By the time the case against Hawkins and Fields proceeded to a bench trial in June 1986, the FBI had become suspicious of petitioner and was monitoring the trial. On June 17 and 18, the State put on three witnesses who identified Hawkins as the murderer. On June 19, McGee called Swano and told him that he needed to "give the books back that he had given him the other day." Swano told McGee to "hold onto the books" at least until the defense could put on a case. On June 26, at the end of trial, McGee called Swano and told him that the fix was off. The next morning, petitioner told Swano that a lawyer had left a file for him in petitioner's chambers. When Swano went to petitioner's chambers, petitioner handed Swano the file folder of money that Swano had passed to McGee at the start of trial. Petitioner found Hawkins and Fields guilty, and he later sentenced them to death. Pet. App. 5a; Gov't C.A. Br. 15-18.

In May 1988, Lucius Robinson testified before a grand jury concerning judicial corruption in general and petitioner in particular. In late 1988 or early 1989, petitioner asked Swano "whether or not [he] was standing tall," which Swano understood to be an inquiry regarding whether he was refusing to cooperate with federal investigators. Swano replied that he was standing tall. During the summer of 1990, petitioner again asked Swano if he was "standing tall," because he had "heard that there is a lot of investigation going on." Swano again replied that he was standing tall. Pet. App. 6a; Gov't C.A. Br. 19-20.

2. After petitioner's conviction, three district judges in the Northern District of Illinois found that one of the prosecutors in this case had failed to dis-

close benefits that had been provided to cooperating members of the El Rukns gang in other trials, in which other members of the El Rukns gang were prosecuted. See *United States* v. *Boyd*, 833 F. Supp. 1277 (1993), aff'd, 55 F.3d 239 (7th Cir. 1995); *United States* v. *Burnside*, 824 F. Supp. 1215 (1993); *United States* v. *Andrews*, 824 F. Supp. 1273 (1993). Because two of the cooperating El Rukns, Hawkins and Derrick Kees, were among the 40 witnesses who testified in this case, petitioner moved for a new trial. Petitioner alleged that the government had failed to disclose material evidence favorable to him and also that the government had knowingly used false testimony. Pet. App. 52a.

The district court denied the motion. Pet. App. 50a-57a. First, the court rejected petitioner's claims that the government had failed to disclose material favorable evidence. The court acknowledged that the government's failure to disclose impeachment evidence had been found material in other trials, but it held that "there is a qualitative difference in the El Rukn testimony in those cases and the El Rukn testimony in this case." *Id.* at 54a. In contrast to the earlier cases, "[h]ere, the guilt or innocence of the defendants * * * did not depend on the believability of Hawkins and Kees. Simply put, the El Rukns witnesses were not testifying to contested issues." *Ibid.* The court concluded that "assuming the government did, in fact, suppress evidence, it was not 'material.'"[3] *Id.* at 54a-55a.

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[3] The government contested petitioner's claim that it had withheld impeachment material, pointing out, among other things, that discovery in petitioner's case coincided with the post-trial hearings on prosecutorial misconduct that were

The court also rejected petitioner's claim that the government had knowingly used false testimony. The court held that even if Hawkins' testimony constituted perjury—an allegation that the court found unsubstantiated, see Pet. App. 56a-57a—there was in any event no "likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 56a. The court further held that petitioner had failed to establish that Swano had testified perjuriously. *Id.* at 57a; see *id.* at 6a-7a; Gov't C.A. Br. 24.

3. The court of appeals affirmed. Pet. App. 1a-38a. The court first rejected petitioner's contention that the government had withheld material exculpatory evidence or knowingly presented perjured testimony. The court upheld the district court's determination that evidence that Hawkins and Kees had engaged in criminal activity and had received benefits from the government after their convictions would not have affected the outcome of the trial because neither witness testified that he had ever seen Swano pass money to petitioner.[4] To the contrary, the court ruled, the El Rukns' testimony was "entirely consistent" with petitioner's defense, which was that Swano and Robinson were defrauding Swano's clients by obtaining money on the false pretense that they were bribing petitioner. *Id.* at 9a-10a.

Petitioner also claimed that the government had suppressed impeachment material that would have

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occurring in the El Rukns cases. See Gov't C.A. Br. 24-25 & nn. 21-22. The district court did not hold a hearing on petitioner's claims or resolve the question whether the government had improperly withheld impeachment material.

[4] Like the district court, the majority assumed without deciding that the government had withheld impeachment material as to Hawkins. See Pet. App. 8a n.3.

assisted him on the question whether the indictment had been returned within the statute of limitations. At trial, Hawkins testified on direct examination that Swano had told him on June 19, 1986, that petitioner had returned the El Rukns bribe. The government sought to impeach that statement with Hawkins' pretrial statement that Swano had merely stated on June 19 that petitioner wanted to return the bribe money. On cross and recross examination, however, petitioner elicited that, in prior sworn testimony, Hawkins had testified consistently with his testimony on direct, *i.e.*, that the bribe was returned on June 19. In the court of appeals, petitioner asserted that if he had had additional impeachment material for Hawkins, the jury may have credited Hawkins' original testimony on direct examination. Had the jury credited Hawkins' testimony on direct, petitioner's argument continued, it may have rejected other evidence that the bribe had been returned on June 27 and concluded that petitioner had returned the bribe on June 19, which was more than five years before the date (June 26, 1991) that the indictment was returned. If that had happened, the argument continued, then the jury might have concluded that Swano was lying when he testified about petitioner's subsequent obstruction of justice activities (which also were racketeering acts and which occurred well within the limitations period), acquitted petitioner of the obstruction charges, and therefore found the entire case time-barred. Pet. App. 10a-11a.

The court of appeals rejected that contention. First, it held that "there is no reasonable probability that disclosure of the information would have resulted in [petitioner's] acquittal on statute of limitations grounds." Pet. App. 11a. It reasoned that petitioner

had rehabilitated Hawkins' initial testimony on cross and recross examination by using Hawkins' testimony in prior trials, which was consistent with his original testimony on direct examination in this case. The court found petitioner's materiality theory a "fairly substantial stretch" and suggested that, even as to the aspect of it concerning the return of the bribe, further impeachment of Hawkins (the only witness who testified that the money was returned outside the limitations period) may have undercut Hawkins' credibility concerning his memory for dates altogether, which would have left "no one * * * to support [petitioner's] basis for the statute of limitations defense." *Ibid.*

Second, the court held that even if the suppressed evidence would have caused the jury to believe that the bribe had been returned on June 19, it was not material because the evidence did not show that petitioner had withdrawn from the conspiracy on that date. Thus, the court held, the timeliness of the indictment did not depend on Hawkins' testimony. Pet. App. 11a.

The court of appeals further held that the district court had not erred in refusing to instruct the jury that it could find that petitioner had withdrawn from the conspiracy by returning the El Rukns bribe. Instead, the court held, petitioner had failed to establish an evidentiary basis for the withdrawal instruction because "the conditional nature of the bribe and the circumstances surrounding it" showed that petitioner's return of the bribe was "more akin to a deal gone sour than an affirmative attempt to defeat the aims of the conspiracy." Pet. App. 12a-13a.

Finally, the court of appeals rejected petitioner's contention that his efforts to obstruct justice (by

urging Swano to "stand tall" against the FBI investigation) did not extend the RICO conspiracy alleged in the indictment. It distinguished *Grunewald* v. *United States*, 353 U.S. 391 (1957), in which this Court held that actions directed at concealing a conspiracy's illegal activities did not extend the life of the conspiracy when the purpose of the original conspiracy had been accomplished. The court of appeals held that "the conspiracy's main criminal objective was never 'finally obtained' in this case" because "the main criminal objective, to fix cases whenever feasible, was neither accomplished nor abandoned as long as [petitioner] remained on the bench, Swano continued to practice before him, and McGee continued his friendship with him." Pet. App. 22a-23a (quoting *United States* v. *Lash*, 937 F.2d 1077, 1082 (6th Cir.), cert. denied, 502 U.S. 949 and 1061 (1991)). Accordingly, the court concluded, "[c]oncealment * * * was an overt act in furtherance of the conspiracy's main objective[]." Pet. App. 23a.[5]

Judge Ripple dissented. He argued that "if the jury had been permitted to hear the evidence of prosecutorial misconduct, it might well have rejected the government's submission that the conspiracy continued within the time period covered by the statute of

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[5] The court of appeals also rejected petitioner's contentions that the evidence was insufficient to support his obstruction of justice convictions; that the jury instructions on the obstruction count were erroneous; that petitioner's efforts to obstruct justice did not fall within the scope of Section 1503; that the district court erred in instructing the jury on the statute of limitations and on the interstate commerce element of RICO; and that the district court erred in admitting evidence of the Chow and Rosario bribes. Pet. App. 14a-33a. Petitioner does not renew those claims in his petition for a writ of certiorari.

limitations." Pet. App. 34a. In Judge Ripple's view, the jury might have concluded that petitioner had withdrawn from the conspiracy on June 19 if it had heard the evidence that Hawkins had received benefits that may have created a "motive to give the government the testimony it wanted to hear." *Id.* at 35a. Judge Ripple also disagreed with the majority's conclusion that petitioner's acts of obstruction of justice prolonged the conspiracy past 1986. *Id.* at 36a-38a.

ARGUMENT

Petitioner contends (Pet. 10-20) that the court of appeals erred in finding that the government had not withheld evidence material to the outcome in this case. In particular, he renews his contention that the jury might have found that he had returned bribe money before the limitations period if it had heard withheld impeachment evidence of Hawkins (who, at one point in his testimony, placed the return of that money within the limitations period). Acceptance of that contention would not entitle petitioner to relief, however, unless the jury could have found that his return of the bribe money more than five years before the indictment issued represented a withdrawal from the conspiracy and that his later acts of obstruction of justice did not prolong the conspiracy beyond that date.[6] Accordingly, he also renews his claims that

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[6] Petitioner asserts (Pet. 16-17) that his *Brady* claim entitles him to relief (under a statute of limitations theory) even if the acts of obstruction with which he was charged were legally capable of extending the conspiracy into 1990. He argues that if the jury had heard additional impeachment of Hawkins and concluded that the prosecution had led him to lie by claiming that the bribe was returned on June 27 rather than on June 19, the jury might also have found that Swano too had lied about

the district court erred in failing to instruct the jury that it could find that petitioner had withdrawn from the conspiracy by returning the bribe and that his obstruction of justice did not prolong the conspiracy. The court of appeals correctly rejected these claims, and they are unworthy of further review.

1. Petitioner is entitled to a new trial only if the evidence withheld from him was material either to guilt or to punishment. *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). Evidence is material when there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U.S. 667, 682 (1985). "A 'reasonable probability' of a different result is * * * shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles* v. *Whitley*, 115 S. Ct. 1555, 1566 (1995) (quoting *Bagley*, 473 U.S. at 678).

Contrary to petitioner's claim (Pet. 11-12), the court of appeals applied the correct standard under *Kyles*. As the court of appeals explained, petitioner's *Brady* claim fails because there was "no reasonable probability" that additional impeachment of Hawkins would have undermined confidence in the verdict.

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that date—as well as petitioner's efforts to obstruct justice between 1988 and 1990. Thus, petitioner claims, "Hawkins' credibility on the issue of the June 19 conversation could have been outcome determinative on the statute of limitations issue." Pet. 17; see also Pet. 21. The court of appeals' determination that "[t]here is no reasonable probability" that additional impeachment of Hawkins would have led the jury to follow petitioner's attenuated line of reasoning (Pet. App. 11a; see also *id.* at 8a, quoting *Kyles* v. *Whitley*, 115 S. Ct. 1555, 1566 (1995)) is correct, factbound, and unworthy of further review.

Pet. App. 11a; see also *id.* at 8a ("A 'reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'") (quoting *Kyles* v. *Whitley*, 115 S. Ct. at 1566). There is no merit to petitioner's suggestion (Pet. 11) that the court of appeals applied a sufficiency of the evidence standard, and thus no conflict with *United States* v. *Smith*, 77 F.3d 511 (D.C. Cir. 1996).

On the facts, petitioner contends that if the jury had concluded that petitioner returned the bribe money on June 19, 1986, it could have found that petitioner withdrew from the conspiracy on that date, rejected the testimony underlying his obstruction of justice convictions, and concluded that the indictment was time-barred. As petitioner concedes (Pet. 5), however, Hawkins "repeatedly" testified that, on June 19, Swano had told him that petitioner had returned the bribe money. See Pet. App. 42a (Hawkins' testimony on direct examination). Although the government impeached Hawkins' testimony with Hawkins' prior statement that Swano had said that petitioner returned the bribe on June 27, *id.* at 48a-49a, Hawkins acknowledged on cross and recross that he had testified in two prior trials that Swano had told him that the bribe had been returned on June 19. *Id.* at 11a. Thus, as the court of appeals pointed out, portions of Hawkins' testimony placed the bribe outside the limitations period, and additional impeachment of Hawkins would have been at least as detrimental to petitioner as to the government. See *ibid.*[7]

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[7] Contrary to petitioner's claim (see Pet. 15 n.8), the government did not argue in closing that Hawkins and Swano had corroborated each other about the date of the return of the

Furthermore, a substantial quantity of evidence, including other testimony, phone records, and corroborating statements on wiretaps established that the return of the bribe had occurred within the limitations period. Accordingly, the court of appeals correctly concluded that, assuming the government had withheld information from petitioner that could have further impeached Hawkins, the information had "no reasonable probability" of affecting the outcome of the trial. *Ibid.*

2. Petitioner's *Brady* claim also fails for the independent reason that—contrary to petitioner's contention (Pet. 20-24)—petitioner's return of the money did not constitute a withdrawal from the conspiracy. Thus, even if the jury had concluded that petitioner returned the El Rukns bribe money on June 19, the indictment would not have been time-barred. For the same reason, the district court did not err in refusing to instruct the jury that it could find that petitioner withdrew from the conspiracy on June 19.

"As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). To raise a defense based on his withdrawal from the conspiracy before the limitations period, petitioner had to show that he engaged in "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated [them] in a manner reasonably calculated to reach co-conspirators." *United*

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bribe. The government merely asserted that the witnesses at trial had corroborated each other about petitioner's bribe-taking. See Tr. 4577-4578.

States v. *United States Gypsum Co.*, 438 U.S. 422, 464 (1978). Withdrawal from a conspiracy can be accomplished only by steps to "disavow or defeat the purpose" of the conspiracy. *Hyde* v. *United States*, 225 U.S. 347, 369 (1912); see *United States* v. *Starrett*, 55 F.3d 1525, 1550 (11th Cir. 1995), cert. denied, 116 S. Ct. 1335, 1369 (1996); *United States* v. *Sax*, 39 F.3d 1380, 1386 (7th Cir. 1994).

Petitioner failed to present evidence sufficient to show that he withdrew from the conspiracy. Instead, the indictment alleged and the evidence showed that petitioner, McGee, and Swano engaged in an ongoing conspiracy to fix felony criminal cases. In one of the fixes, the Hawkins/Fields murder prosecution, petitioner agreed to acquit the defendants for $10,000 if Swano put on a "good [defense] case" so that petitioner would not "look bad." Ultimately, petitioner returned the bribe because of the strength of the State's case, the FBI scrutiny that petitioner had attracted, and the resulting prospect that petitioner would "look bad" if he delivered on the fix. Thus, the Hawkins/Fields fix was conditional from the outset, and petitioner's return of the bribe showed only that he believed that he could not satisfy his end of the bargain without exposing his illicit agreement. See *United States* v. *Dworken*, 855 F.2d 12, 34 (1st Cir. 1988) (defendant not entitled to assert withdrawal defense where withdrawal caused by "fear of apprehension, not because of a change of heart"); *United States* v. *Bastone*, 526 F.2d 971, 988 (7th Cir. 1975) (rejecting withdrawal defense where inactivity was the product of defendant's "'troubles' with law enforcement officials and * * * [need] to 'lay low' for awhile"), cert. denied, 425 U.S. 973 (1976). The return of the bribe was not inconsistent with the ongoing

purpose of the conspiracy established at trial, and the lower courts therefore correctly ruled that there was insufficient evidence to justify a withdrawal instruction. Moreover, petitioner never affirmatively disavowed the aims of the conspiracy or took any step that unequivocally demonstrated an intent to terminate his participation in the conspiracy. Accordingly, the court of appeals correctly rejected petitioner's claim, and further review is unwarranted.[8]

3. Petitioner's final contention (Pet. 24-29)—that the court of appeals erred in finding that his acts of obstruction of justice extended the conspiracy—also is without merit. Accordingly, even if he were correct that his return of the El Rukns bribe was evidence of his intent to withdraw from the conspiracy, he could not establish that the jury could have found that the indictment was barred by the statute of limitations.

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[8] Contrary to petitioner's contention (Pet. 20-21), the district court's refusal to give the jury a withdrawal instruction is consistent with this Court's decision in *United States Gypsum Co.* In that case, a lengthy and complex criminal antitrust prosecution, the district court had instructed the jury that it could find that the defendant had withdrawn from the conspiracy, if at all, only by two specified means. This Court held that the district court had placed an undue limitation on the jury's consideration of the evidence. Nothing in that decision draws into question the settled principle that a defendant must produce sufficient evidence of a theory of defense to be entitled to a jury instruction on that defense. Similarly, there is no merit to petitioner's claim that the court of appeals' decision conflicts with *United States* v. *Antar*, 53 F.3d 568 (3d Cir. 1995). In that case, as here, the court stressed that a defendant "must come forward with evidence evincing a prima facie showing of withdrawal." *Id.* at 582.

In *Grunewald* v. *United States*, 353 U.S. 391 (1957), the defendants had engaged in a conspiracy illicitly to prevent criminal prosecution of two businesses on tax evasion violations. The aim of the conspiracy was accomplished when the conspirators obtained "no prosecution" rulings from the IRS. *Id.* at 406. After the statute of limitations had run on these acts, the government obtained an indictment, alleging that acts "directed at concealing the irregularities in the disposition" of the two cases extended the conspiracy. *Id.* at 395. This Court held that "after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." *Id.* at 401-402. Accordingly, the Court held, the acts of concealment had not extended the conspiracy for purposes of the statute of limitations. *Id.* at 406.

Contrary to petitioner's claim, the court of appeals' decision does not conflict with *Grunewald*. In contrast to *Grunewald*, petitioner participated in an ongoing conspiracy to fix criminal cases. The object of the conspiracy was therefore not a discrete criminal act that, once achieved, would have terminated the conspiracy. "Where a conspiracy contemplates a continuity of purpose and a continued performance of [criminal] acts, it is presumed to exist until there has been an affirmative showing that it has terminated." *United States* v. *Elwell*, 984 F.2d 1289, 1293 (1st Cir.), cert. denied, 508 U.S. 945 (1993); accord *United States* v. *Starrett*, 55 F.3d at 1550; *United States* v. *Hamilton*, 689 F.2d 1262, 1268 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983). As the court of appeals conclud-

ed, because the conspiracy had an ongoing purpose, it continued as long as the conspirators were in a position to continue to achieve its objectives. Thus, petitioner's acts of obstruction of justice furthered the conspiracy by maintaining petitioner's position on the bench. Those acts therefore constituted acts in furtherance of the conspiracy. Pet. App. 23a-24a. See *United States* v. *Eisen*, 974 F.2d 246, 269 n.8 (2d Cir. 1992) (acts designed to conceal an ongoing conspiracy are in furtherance of the conspiracy), cert. denied, 507 U.S. 998 and 1029 (1993); *United States* v. *LeFevour*, 798 F.2d 977, 982 (7th Cir. 1986) (acts of concealment furthered the objects of the conspiracy); *United States* v. *Howard*, 770 F.2d 57, 60-61 (6th Cir. 1985) (same), cert. denied, 475 U.S. 1022 (1986). Accordingly, petitioner's obstruction of justice extended the limitations period for the conspiracy charged in the indictment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1996